arguably more analytically relevant (to the extent that there is *any* analytical basis underlying ownership restrictions),[4] but proliferation in numbers also simultaneously obliterates the basis and obviates the need for ownership restrictions.

Moreover, we note that the Commission still seems reluctant, perhaps understandably after being burned politically in the past, to "do the right thing" and actually create a world without any regulatory restrictions on national broadcast ownership. Where the Commission in 1984 clearly conceived of such a world, the current Commission states its **belief** that "changes in the national ownership rules should be incremental in order to *avoid significant dislocation in the television industry*."[5] Does not the rapid growth of cable television, the proliferation of VCRs and PCS, the arrival at long last of DBS and the likely entry of telephone companies into video delivery portend "significant dislocation" in the television industry? In fact, what constitutes the "television industry" in a world of convergence and multimedia?[6] In the face of rapidly changing markets and technology, the FCC seems needlessly wedded to drawing lines and establishing caps rather than removing barriers and permitting real competition.[7] Instead of continuing to apply what it concedes are arbitrary restrictions in the form of numerical or reach limits and assessing the costs and benefits of gradual relaxation, we believe the Commission should demonstrate its institutional relevance by withdrawing itself from regulation of national broadcast ownership altogether. It can monitor the

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3 (...continued)
terms (*viz.*, three versus four) despite a doubling in the relevant universe.

4 Market power (in a relevant economic market) depends on relative rather than absolute size. Economic Nobelist George Stigler remarks that: "The *purpose* of a measure of concentration is to predict the extent of the departure of price (or, alternatively, of rate of return) from the competitive level." *See* "The Measurement of Concentration," in *The Organization of Industry* (Richard D. Irwin, Inc., Homewood, Illinois: 1968), p. 30.

5 Notice at para. 100 (emphasis added).

6 This is not to suggest that the continued availability of free over-the-air broadcasting is unimportant in the brave new multimedia world. Precisely because broadcasting is free and universally available, the Commission should be careful not to burden broadcast station owners with unnecessary regulation that restricts their ability to compete. Along these lines we note that each of the two recently announced Hollywood/RBOC video programming alliances will be able to "reach" approximately half the homes in the United States by means of local distribution systems which they own.

7 Some critics of the FCC's broadcast ownership rules have noted that the effect of the rules has actually been to reduce competition by, among other things, preserving existing combinations and reducing the likelihood of new entry. *See* Harry M. Shooshan III and Catherine Reiss Sloan, "FCC Media Ownership Rules: The Case for Repeal," *Journal of Communication*, Volume 32:4, Autumn 1982.

deregulated market and, if problems arise that cannot be dealt with adequately by antitrust authorities, it can then carefully tailor a regulatory fix.

Ancient History

The early history of the broadcast station ownership restrictions has often been recited, sometimes rotely and sometimes more critically.[8] We think several points are worth noting about the early rules and their motivation. First, we think the form in which the rules were stated is itself of some interest. The early rules start out saying that no person can own, operate or control more than one station of a particular type, *except* upon a showing that owning more than one would foster competition or provide a "distinct and separate" service, and would not result in concentration of control inconsistent with "public interest, convenience or necessity." They then go on to note that exceptions may only occur provided that some absolute limit deemed to constitute a level of concentration *inconsistent* with public interest, convenience or necessity (*viz., e.g.*, six in the case of the initial FM restriction) is not exceeded.

By entertaining the possibility of exceptions to the ownership-of-one rule, the government was not only conceding in principle the possibility that there could well exist beneficial exceptions to the rule, but also that such benefits might consist precisely in terms of the currencies it cites as the motivating forces for imposition of the restrictions in the first place (*viz.*, competition and diversity). As policymaking, this is suspect at best, and, considered in less favorable light, borders on the incoherent.[9] Keep in mind that the original Communications Act did not actually talk about either competition or diversity,[10] and that, in analytical terms. while there is a basis for positing *some*, if

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8 For a penetrating assessment of network-related issues, *see* L.A. Powe, Jr., *FCC Determinations on Networking Issues in Multiple Ownership Proceedings* (Network Inquiry Special Staff Preliminary Report on Prospects for Additional Networks) (February 1980).

9 Assigning a burden of proof might well make sense, although which way it makes sense to assign the burden and what the specific focus of the burden should be are, by no means, obvious. The selection of an arbitrary number (*viz.*, say "six") beyond which further proof is deemed unavailing is certainly hard to rationalize.

10 "Rapid," "efficient," "nation-wide," and "world-wide" are the adjectives Congress uses to describe the kind of service regulation should seek to make available. *See The Communications Act of 1934, As Amended,* Section 1. Nothing in the Communications Act provides the FCC with specific authority to adopt restrictions on the ownership of mass-media outlets. The group ownership rules were first adopted in 1940 to avoid "the concentration (continued...)

not a close, relationship between competition and the number of competitors, there is little basis for positing a positive connection between ownership and programming diversity. Indeed, there is a well-known analytical basis for positing a negative connection.[11]

The legal origins of the "public interest, convenience, or necessity" phraseology are to be found in state public utility legislation and in the Transportation Act of 1920, which provides for the issuance of certificates of convenience and necessity by the Interstate Commerce Commission.[12] The public interest standard is an official incantation (the Spanish colonial "requerimiento" is perhaps an apt analogy) that serves to justify or bless what is being required or undertaken. As is well known, this standard *has no fixed meaning*; it means only what the government says it means or chooses to have it mean in any particular context or circumstance. Thus, when the FCC holds that ownership of more than six stations constitutes a level of ownership inconsistent with the public interest, the *real* meaning of its holding is merely the holding's practical import that six is the limit in terms of potential exceptions to the ownership-of-one rule. Suppose the "public interest" meant "maximum consumer welfare" as this concept is commonly understood in economic analysis. In that case, the government's rule would have an independent meaning and predictive content. It would *mean* that the government actually thinks that, notwithstanding possible benefits of multiple station ownership, consumer welfare is likely to decline if one entity controls more than six stations. That is, at least in principle, a testable proposition (*i.e.*, potentially refutable).

The truth of the matter is that when the FCC set and subsequently revised its ownership limits, it had no evidence that what it was doing promoted diversity and prevented undue concentration of economic power. The limits it established were plainly arbitrary and based on largely unstated premises, the validity of which were implicitly assumed and not grounded in any kind of

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[10] (...continued)
of control of . . . broadcasting facilities in a manner inconsistent with the public interest. . . ." *See* Fed. Reg. 2382, 2384 [1940].

[11] *See* Peter O. Steiner, "Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, *Quarterly Journal of Economics* 66 (1952).

[12] *See* U.S. Congress, Senate, *Hearings Before the Committee on Interstate Commerce on S. 1 and S. 1754,* 68th Congress, 1st session, (February 26, 1926), pp. 104-105. No particular significance attaches to the separate words "interest," "convenience," or "necessity," as distinguished from the phrase considered as a whole. *See* L.G. Caldwell, "The Standard of Public Interest, Convenience, or Necessity as Used in the Radio Act of 1927," 1 *Air Law Review* 295, (July 1930), pp. 303-13.

empirical evidence. Decades later the Commission admitted that the rules had originally been adopted "on the basis of prognostication, not empirical proof, and relied on assumptions which at the time were untestable."[13] That the rules actually promote or are integral to genuine diversity or prevent anticompetitive conduct had been simply assumed.

Anticipating subsequent discussion, it is interesting to note that, when the Commission eventually sought to rationalize its ownership regulation, it built its argument on two keystones: (1) that its relaxation of the multiple ownership rules would not affect the Commission's Duopoly Rules or its One-to-a-Market-Rule, that is, that competition and diversity in local markets are generally what matter; and (2) substantial evidence suggesting that group ownership would actually enhance competition and diversity in local markets.[14] The latter finding is more than a little ironic in light of previously operative premises underlying the ownership rules. It is interesting what you find when you actually take the time to look.[15]

The Commission's early decision in *In the Matter of Sherwood B. Brunton*[16] both illustrates the extent to which "there is nothing new under the sun" when it comes to arguments about broadcast ownership restrictions, and provides an illuminating perspective on the now traditionally contesting points of view. This case involved the proposed transfer of an AM station located in San Jose, California to the Columbia Broadcasting System (CBS). At the time of the proposed transfer, there were 12 AM stations serving the city of San Francisco and CBS owned seven AM stations nation-wide, six of which were 50,000-watt clear channel stations. CBS also owned two FM stations and had applications pending for three additional FM stations. It also held the licenses for one commercial and two experimental television stations.

CBS's affirmative arguments in favor of the acquisition of the station were that a variety of productive economies would be thereby facilitated, notably, that the CBS network's capacity to

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13 *Op. cit.* (1984), para. 20, p. 24.

14 *Ibid.*, Section 4.

15 In particular, the record the Commission assembled included evidence that group-owned media tend to have larger news staffs, do more local news programming, and are perceived as producing higher quality programs than single owners.

16 11 FCC 407 (1946)

produce better programming would be enhanced by its ability to assure more effective distribution of its programming in the Bay area,[17] and that, as a network originating point, the facilities and operations of the local station would be upgraded, thus producing benefits in terms of localism, and, finally, that there would be a reduction in financial risk.

The Commission majority discounted these hypothesized benefits completely, arguing, in essence, that more effective networking would limit competition among networks (in much the same way the marriage limits benefits from "playing the field" — of course, playing the field also limits benefits from marriage!).[18] With regard to side benefits from improvements in local station facilities, the Commission's response was that CBS already owned a station on the West Coast (in Los Angeles). Thus did the Commission deal San Franciscans the ultimate insult by lumping them right along with Los Angelenos. On potential risk reduction, the Commission simply noted that CBS was doing fine without owning the station.

From the Commission's standpoint, the principal issue raised by the application was simply "whether the acquisition of an additional station by CBS would result in such a concentration of broadcast facilities as not to be in the public interest."[19] The Commission majority simply stated that it would result in such a concentration without offering any explanation why.

Commissioners Jett and Wakefield dissented. Commissioner Jett's view was that the acquisition would result in greater program origination "in the important San Francisco Bay area" and "tend to improve the competition situation in that area."[20] He noted that "there is nothing in the record to support a finding that the seven stations mentioned in the majority opinion constitute a

[17] This was, in embryonic form, the essence of the argument about network efficiencies subsequently made by the FCC Special Staff in *The Network Inquiry*.

[18] It was not until the time of the Network Inquiry that the Commission finally came to understand the true economic function of networks in terms of providing a means for improving programming and expanding output, and to comprehend that it is the number of stations which limits the formation of networks, not the formation of networks which limits the formation of networks.

[19] *Brunton*, p. 412.

[20] *Ibid*, p. 414.

concentration of control of AM facilities on the part of CBS."[21] He then stated his opinion that "the doctrine of free enterprise and competition does not lend itself to a policy which seems to set an arbitrary limit on the ownership of stations."[22] He went on to make the argument for case-by-case antitrust-style enforcement, pointing out that "it is possible, for example, that common ownership or control of say six stations in a small section of the country may militate against the public interest, while no opposition would be raised to twice that number over widely separated areas in the United States."[23]

In his dissent, Commission Wakefield noted his general agreement with the views expressed by Commissioner Jett, and pointed out that, "The majority opinion ignores completely such essential factors as the number of other broadcast services available in the San Francisco Bay area, the distant location of other Columbia-owned stations, and the importance of a San Francisco-owned station to Columbia operations as a network."[24] He went on to describe relevant characteristics of the market structure then prevailing in the San Francisco Bay area. He then said several sensible things, remarking, *inter alia*, that,

> There may be a need for some limitation on the number of stations owned by a single group in the absence of affirmative reasons which indicate otherwise. . . [but that the] acquisition of an additional broadcast station by a network in a key city where there is such a large number of stations as in San Francisco does not adversely affect competition in either network broadcasting or other forms of broadcast service. Weak networks are not necessarily good networks nor powerful networks bad.[25]

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21 *Ibid.*, p. 416

22 *Ibid*

23 *Ibid.*

24 *Ibid.*, p. 417.

25 *Ibid.*, p. 418.

The Dark Ages

The Commission's 1953 *Amendment of Multiple Ownership Rules*[26] marks a low point in its regulation of multiple station ownership. In its rulemaking, the Commission sought to respond to numerous objections to its multiple ownership restraints. The Commission's order has an almost schizophrenic quality. On the one hand, defending itself against charges that it was merely attempting to enforce the antitrust laws, the Commission is at considerable pains to point up the general rulemaking power that had been conferred upon it by the Communications Act (almost going so far as to suggest that the rules were justified by the Commission's power to promulgate them), as well as its competence based on "knowledge and experience acquired by this Commission over a period of more than a decade in the handling of these problems."[27] On the other hand, the Commission, notwithstanding its asserted power and know-how, is at pains to justify its essentially arbitrary and crudely specified limitations.

In response to criticism that its rules were arbitrary in that they gave no effect to class and size of stations, geographical locations, populations, and similar factors — precisely the kinds of factors a penetrating antitrust analysis of competitive conditions would consider as a matter of course — the Commission argued that such factors cannot be satisfactorily or workably embodied in a formula. That, of course, sounds more like a compelling argument *against* use of a simple formula, then a cogent defense of what amounts to little more than the Commission's preference for a simplistic approach. Attempting to defend arbitrary limits (*i.e., viz.,* the defenseless), the Commission notes that, even if all the AM stations owned by one party were small, if they were concentrated in the same general area, ownership of more than seven stations would result in a concentration of control that would be contrary to the public interest.[28] That not only begs the question of why seven constitutes the relevant boundary, but it also suggests circumstances (*viz.*, geographic dispersion) where ownership of more than seven (small) stations would not compromise "the public interest."

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26 9 RR 1563. This amendment allowed for the common ownership of seven AM, seven FM and five TV stations. In 1954 the limit on television stations was raised to seven, with no more than five being VHF stations. *See Amendment of Multiple Ownership Rules*, 43 FCC 2797 (1954).

27 *Ibid.* (1953), para. 4, p. 1566.

28 *Ibid.*, para. 11, fn. 8, p. 1569.

The Commission's decision is also of interest in that it did entail an upward revision. The amended rules raised the limitation on FM station ownership to seven, the same as the AM figure. In rationalizing this change, the Commission stated that "it is considered desirable to have the same limitation applicable to both aural services because of their inter-relationship and the present status of FM's growth"[29] and noted that most FM stations were then owned by AM licensees and duplicated the AM programming. The specific limitation on the holding of interests in excess of seven AM stations was a new provision of the Commission's Rules on multiple ownership. The Commission's logic is worthy of contemplation. It noted that the greater potential of the FM band to accommodate a larger number of stations might have justified "*a more severe limitation in AM*" [emphasis added].[30] However, the Commission decided to settle on a seven-station limit "in order that present holdings of such stations be not unduly disrupted."[31] That an increase in the number of stations might have suggested a relaxation of restrictions on ownership seems never to have occurred to the Commission. Its selection of seven in the event seems hardly to have been premised on any principle other than expedience.

The Age of Enlightenment

In its 1984 *Amendment of Multiple Ownership Rules*, the FCC undertook a fundamental assessment of its ownership limitations, and concluded that the rules were no longer relevant and no longer fostered the Commission's dual goals of promoting diversity and competition. "Out of an abundance of caution" and "sensitive to . . . concern that if all restrictions were removed immediately then structural changes might occur before the full ramifications of these changes became evident,"[32] the Commission decided to phase out the rules over a six-year period during which multiple station ownership in each broadcast service would be capped at a numerical limit of 12. Upon recon-

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[29] *Ibid.*, para. 17, p. 1572.

[30] *Ibid.*, para. 18, p. 1572.

[31] *Ibid.* The Commission offered licensees who found themselves out of compliance with the new rule the opportunity to show cause why they should not divest themselves as necessary to conform, and stated that decisions would be made on the basis of the arguments adduced and the factors involved in each case.

[32] *Op. Cit.*, (1984), para. 5, p. 18.

sideration and reportedly subject to very intense political pressure, the Commission, notwithstanding its express conviction that its original conclusions were correct, eliminated the sunset provision and adopted a new TV station multiple ownership restriction based on a percentage of national audience reach (itself tailored to account for the distinct characteristics of UHF television stations and adjusted to promote minority ownership of broadcast facilities).[33]

The arguments against a reach cap were well stated by Chairman Fowler and Commissioner Patrick in their separate statements on the Commission's 1984 *Report and Order*. Chairman Fowler pointed out that a reach measure "excludes without justification video competitors to over-the-air television such as cable, SMATV, MDS, and video cassette. More significant, it excludes all competitors to broadcast television for the relevant national and local advertising dollar without a reasoned explanation."[34] He thus concludes that a reach percentage test is "an arbitrary numerator in search of an undefined denominator."[35] Noting that the Department of Justice's calculation of Herfindal indices indicated that radio and television markets were very unconcentrated, Commissioner Patrick criticized a reach cap as "no less arbitrary than a station cap" in that "it still sets an arbitrary limit over which we prohibit acquisitions without reference to particular circumstances."[36] He then observed that:

> With respect to diversity, the local market is of paramount concern. National reach is irrelevant to that concern. With respect to economic concentration, the relevant factor would seem to be not reach but audience *share*. Economic concentration is only relevant to the extent that it reflects market power. If a station has a 75% reach but 0% share, surely no concentration concern is raised.[37]

As noted earlier, the Commission's conclusion that national ownership caps serve no useful purpose and are inimical to competition and diversity concerns was premised on two basic argu-

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33 *See Amendment of Multiple Ownership Rules*, (Gen. Docket 83-1009) 100 FCC 2d 17, 18 (1984) *recon. granted in part* 100 FCC 2d 74 (1985), para. 3, p. 76.

34 *Ibid.*, p. 57.

35 *Ibid.*

36 *Ibid.*, p. 61.

37 *Ibid.*

ments. The first was that, for purposes of evaluating the existence of substitute alternatives, relevant markets are local markets, that national ownership caps "bear no necessary relationship to the number of independent viewpoints in a particular local market,"[38] and that "elimination of the rule is unlikely to have an adverse impact on the number of independent viewpoints available to consumers."[39] The Commission cited numerous statistics indicating a veritable cacophony of competing voices in local markets.

The Commission's second argument was based on a significant amount of evidence which had been adduced indicating that the performance of group-owned local stations was superior in terms of presentation of news and public affairs programming. Equipped with this factual foundation, the Commission reasoned that "fidelity to First Amendment values and the public interest counsels the Commission against rules or policies that could artificially restrict group ownership of broadcast stations, thereby reducing the amount of the news or public affairs programming that fosters an informed electorate."[40]

Apart from the principal fact that the Commission's phase-out of the multiple ownership rules was not permitted to proceed, another depressing aspect of this proceeding was that, having striven mightily and effectively to produce a sound analytical and factual basis for reform, the Commission adopted new caps that were actually *relatively* more restrictive in light of the tremendous expansion in the number of stations, not to mention other media, that had transpired since 1953. Having argued persuasively that it is relative size that matters, the Commission in the event adopted caps that were tighter in relative terms. The fact that the Commission was not permitted to abandon the rules was unfortunate; the fact that it was not able to implement a reform in keeping with the principal thrust of its analysis gives the whole exercise an aura of frustration.

In Table 1, we replicate an analysis the Commission undertook and remarked upon in its 1984 *Report and Order*. In 1953(-4), at a time when there were 2,458 AM stations, 686 FM stations,

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38 *Ibid.*, para. 32, p. 27.

39 *Ibid.*

40 *Ibid.*, para. 55, p. 35.

and 199 TV stations, the Commission established its rule of sevens.[41] The defined limits and the actual number of stations in 1953 imply a set of proportions (*viz.*, the limits divided by the respective numbers of stations). These proportions, when multiplied times the number of stations in (April) 1984, supply a set of alternative limits which coincide with what the Commission would have permitted in 1984 had it simply stuck with the same relative proportions of total stations it had established in 1953-4. As can be easily verified by inspection, if what had passed muster in 1953 had been deemed to pass muster in 1984, ownership of a substantially larger number of stations would have been permitted than actually was permitted under the so-called reform and notwithstanding the Commission's insight that relative size in a relevant market was what was important.[42]

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[41] The Commission originally set the TV limit at five and, the following year, raised it to seven with no more than five in the VHF band. *See Amendment of Multiple Ownership Rules*, 43 FCC 2797 (1954). Interestingly, in rendering that decision, the Commission (para. 14, pp. 2801-2802) observes that "if the only relevant consideration were implementation of the policy of diversification, an absolute limitation of one broadcast station to any one person or persons under common control would best serve the public interest. But, of course, that is not the case. The multiple ownership of broadcast stations does play an important role in our nation-wide broadcast system. The ownership of broadcast stations in major markets by the networks, for example, is an important element of network broadcasting. Our nation-wide system of broadcasting as we know it today requires that some multiple ownership of broadcast stations be permitted." The Commission then goes on to argue that "the greater good" will flow from enforcement of limits that offset "the disadvantage" (unspecified) resulting from ownership of a larger number of stations.

[42] Some commenters suggested that the Commission's use in its *Notice* of statistics indicating the number of on-air stations in 1953 was misleading because the Commission was cognizant of impending growth in setting its limits. However, use of the alternative numbers commenters proposed does not affect these reported results materially. Note that the number of stations the Commission assumed for purposes of comparison in 1984 understated the relevant universe, ignoring large impending increases in station numbers.

Table 1					
	When Rules Implemented (1953):			1984:	
Station Type	Stations Allowed (1)	Stations in Existence (2)	Ratios (1) ÷ (2) (3)	Stations in Existence (4)	Adjusted Cap (3) X (4) (5)
AM Radio	7	2,458	0.00285	4,747	14
FM Radio	7	686	0.01020	4,717	48
Tele-vision	7	199	0.03518	1,169	41

In Table 2, we perform the same type of analysis using relative proportions implied by the Commission's 1984 limits and (April) 1984 stations numbers. Multiplying these proportions times the current numbers of stations supplies a set of alternative limits which coincide with what the Commission would now permit if it simply stuck with the same relative proportions of total stations it established in 1984-5. As can be seen from Table 2, if the Commission were to establish new absolute limits on the basis of the implied 1984 proportions, which had themselves failed so badly to maintain proportional parity, it would adopt only modest upward revisions to its current rules.

Table 2					
	When Rules Implemented (1984):			Today:	
Station Type	Stations Allowed (1)	Stations in Existence (2)	Ratios (1) ÷ (2) (3)	Stations in Existence (4)	Adjusted Cap (3) X (4) (5)
AM Radio	12	4,747	0.00253	4,911	12
FM Radio	12	4,717	0.00254	6,900	18
Tele-vision	12	1,169	0.01027	1,529	16

It should, however, be emphasized that, in calculating these hybrid limits, we have ignored the evolution of alternatives to the broadcast media, notably cable and now DBS, which are the primary source of growth in voices in the modern era. Were we to have taken these alternatives into account, the limits 1984 proportionality would imply would be substantially larger given the additional number of channels available. The existence of such alternatives and their actual and prospective expansion were principal reasons why the Commission in 1984 thought a sunset of the national ownership limitations was warranted. Certainly, as we note just ahead, all industry trends since 1984 indicate that the basis for that conclusion has grown nothing but stronger.

The Age of Anxiety

In 1991, two FCC economists (Florence Setzer and Jonathan Levy) produced a penetrating analysis of the plight of "Broadcast Television in a Multichannel Marketplace."[43] Setzer and Levy concluded that "broadcast television has suffered an irreversible long-term decline in audience and revenue share," and that "broadcasters will face intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels

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43 *See* FCC, OPP Working Paper Series: 26 (June 1991).

of programming, expand their reach and their audience."[44] They predict that "small-market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark."[45] These conclusions have been drawn by other reputable analysts. For example, Owen and Wildman, in *Video Economics,*[46] remark that, "Ultimately, of course, the disadvantages of over-the-air broadcast stations (limited channels, single channels and no practical means to charge viewers) may lead them to be superseded entirely, either by cable or by some different technology."

Over the last 25 years, the video landscape has been radically transformed by a variety of interrelated economic and technological developments. During the 1980s cable television became a communications industry giant in the United States, substantially increasing its market penetration, vertically integrating extensively into program production and supply, competing for local and national market advertising sales, and currently poised to enter the market for telephone service. Cable now passes by over 91 million households (about 97 percent of all television households) in the United States, and its market penetration is now about 63 percent of television households. Most cable subscribers now receive 30 or more channels, and nearly 40 percent receive 54 or more channels. Cable offers a large number and variety of program services. In 1994, there were 79 basic cable networks and 30 national nonbasic service networks. There are also a large number of regional cable networks.

In addition to cable, more than two million households now receive programming distributed by C-Band satellites utilizing backyard dishes. Recently, direct broadcast satellite (DBS) companies began offering a wide range of digital program services using Ku-Band high-power satellites in combination with "pie plate"-size dishes. It is estimated that the number of DBS subscribers will reach one million by the end of 1995. SMATV services are utilized by another million subscribers, and wireless cable (MMDS) has attracted over a half million subscribers. Looming large on the fringes of the market are the telephone companies, although the FCC has been slow to approve telephone company video services. The telephone companies pose a highly credible competitive

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44 *Ibid.*, p. vii.

45 *Ibid.*

46 Harvard University Press, 1992, p. 255.

threat because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and, last but by no means least, their financial strength and perceived staying power.

On top of all this activity involving the creation of new distribution paths and delivery of new entertainment and information services to the home, there has been a simultaneous revolution in the sophistication of the communications equipment employed in the home. Today more than 84 million U.S. households have VCRs. In 1994, U.S. households spent as much money purchasing and renting videos ($14 billion) as the combined revenues of all basic cable ($4.6 billion) and the three established broadcast networks ($9.4 billion) in 1993. In 1994, 37 percent of U.S. households owned personal computers (PCs). PC penetration was actually slightly higher in television households (38.2 percent). Ten percent of those PCs had CD-ROM capability and that number is expected to rise to 30 percent in 1998. In 1993, estimated retail sales of North American computer software sales were $6.8 billion.

In addition to the purchase and rental of video and information software, recent years have witnessed rapid growth in information services. For example, between 1990 and the end of 1994, the number of subscribers to the top five on-line information services (Prodigy, CompuServe, American On-line, Delphi and Genie) grew from 1.7 million to 5.58 million. The World Wide Web, which offered access to 130 Internet sites in June 1993, connected 12,000 sites at the beginning of 1995. By one estimate, there are 50 to 100 new sites added to the World Wide Web each day. According to one estimate, revenue generated by electronic databases grew by nearly 60 percent between 1992 and 1993, and revenue from consumer on-line services increased by 23 percent during the same period. By 1998, it is anticipated that nearly 11 percent of television households will subscribe to at least one on-line service.

In 1984, when the Commission sought to sunset the ownership limitations, it cited growth in competitive alternatives as undermining the case for restrictions, and pointed to the programming benefits that could be achieved through more intensive exploitation of economies of scale and scope in a multiple station operation. Setzer and Levy, in reintroducing the topic of the ownership restrictions's efficacy, argue that reform is now less a matter of good things being permitted to happen than it is mitigating harms that are likely to befall over-the-air broadcast stations as competition further intensifies. They argue that "existing broadcast regulations may prevent broadcasters from adopting more efficient forms of organization," and that "broadcaster should not be hindered excessively from diversifying to make efficient use of their core skills — production, acquisition, and scheduling of programming, as well as selling advertising."[47] They argue forthrightly for the elimination of the broadcast multiple ownership rules.

Setzer and Levy also argue for relaxation of the duopoly rules. In our view, just as increased group ownership would likely foster more effective exploitation of operating efficiencies, relaxation on consolidation of ownership of stations in local markets would similarly allow more efficient operations. The theoretical/common sense arguments are that there would be significantly beneficial consequences in terms of operating efficiencies if greater resource sharing in terms of administration, marketing and technical facilities could be achieved. Relaxation of these rules could also promote greater diversity of local programming.[48] To the extent that the Commission has been concerned about promoting maximum diversity of viewpoints (*i.e.*, editorial diversity), any reduction that *might* result from elimination of the duopoly rules will be more than offset by the additional local "voices" provided by cable, wireless cable and ultimately telephone company video services. Moreover, in a world where a single cable operator can control up to 500 channels in a local market, the duopoly rules (and restrictions on LMAs or other arm's-length deals among local broadcasters) unfairly restrict broadcasters from competing and have the effect of relegating over-the-air broadcasting and its viewers and listeners to second-class status.

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[47] *Op. cit.*, p. x. In its 1984 order (*op. cit.*, para. 82, pp. 44-45), the Commission remarked that "elimination of the rule may allow group owned television and radio stations to exploit important efficiencies. . . . [S]ome buyers of stations may have superior skills. Those were superior managerial abilities may be able to do a better job of matching programming to local tastes and thus garner larger audiences. In these cases, the owners who do a better job of satisfying consumer demands earn more from the station and hence value it more highly. Society is well-served by such acquisitions. Third, some group owners may have cost advantages derived from economies of scale. These economies may mean that the cost of operating an additional station is less for a group owner than would be the cost of running a single station for a new owner. These economies of scale may stem from the ability to spread the services of management, bookkeeping, secretarial, sales, and programming personnel over a number of stations, and the potential for group advertising sales and program purchases."

[48] Steiner, "Program Patterns and Preferences."

The Golden Age

As the Commission recognizes in its Notice, the world has changed and continues to change rapidly. At each step of its discussion of the national ownership rule, the Commission seems to suggest —properly, we think — that there is no basis for any restriction. Yet, inexplicably, except perhaps out of an abundance of political caution, the Commission seems reluctant to simply remove the limits on broadcast station ownership and permit markets to work.

After concluding that (1) restricting national ownership will not increase local concentration or reduce the diversity of viewpoints in local markets, and (2) current levels of national concentration are low measured by antitrust standards and extensive consolidations could take place before creating any concerns about competition, the Commission poses reforms in terms of "raising" national ownership limitations. If the Commission can conclude, as we think it can, that there is no apparent rationale for regulation (as opposed to enforcement of the antitrust laws), why then regulate at all?

The Commission seeks comment on a variety of "fixes," some of which are more liberal than others, but all of which appear to us to be equally arbitrary. The very fact that the Commission can ask for comment on increasing the station cap to "18, 20 or 24 television stations" suggests that there is no "right" (as opposed to politically correct) number. Altering the reach number to "30 or 35 percent" or keeping the reach number at 25 while increasing the numerical limit on stations also have no theoretical or factual basis. Similarly, eliminating the numerical cap while allowing the reach cap to increase over time suggests the Commission's reluctance to take its foot off the brake all at once (while competition from other services is accelerating). Moreover, to establish 50 percent as "the final limit" makes no sense. Why isn't the final limit no limit at all? And what basis is there for not getting from here to there as rapidly as possible, if not immediately? The Commission asks for comment about whether, in the event it opts for a phased approach to relaxation, it should monitor the status of the broadcast industry "prior to each change in the national ownership limit." Commission monitoring may well be useful, but why not simply monitor a deregulated industry to determine if any limitations should be reïmposed?

There is little doubt or disagreement that mass media is entering a potential "Golden Age" with the establishment of cable television as a national service, the growth of new distribution technologies, the prospect of Advanced Television and related services and the likely entry (in one form or another) of telephone companies. The emergence of the Fox Network and the introduction of the Warner Brothers and United Paramount Networks, along with over a hundred new cable programming services offer consumers more choices than ever. And the range of choice is constantly expanding. Commission policies have certainly contributed to these developments. The challenge facing the Commission in reviewing its ownership rules is to permit free over-the-air terrestrial broadcasting to adapt to these changes. Such adaptation will be considerably easier if the Commission will take its collective foot off the brake.

Repeal of restrictions on multiple ownership does not constitute repeal of the antitrust laws. Mergers and acquisitions of broadcast properties, whether national or local, would remain subject to the full panoply of antitrust enforcement tools. It is striking to observe the extent to which the FCC, in analyzing its ownership restrictions, is essentially *duplicating* the analysis the antitrust agencies would, in any event, conduct were an actual merger or acquisition proposed. Whether any particular consolidation will pass competitive muster will necessarily depend on prevailing market conditions in particular market circumstances. To the extent that the FCC is evaluating issues the antitrust agencies could and, presumptively, would be evaluating anyway, its evaluation is redundant and unnecessary for reasons other than its own imperatives.

Moreover, by barring *all* combinations that exceed the cap in order to protect the public from the possibility that *bad* things might occur, across-the-board rules also prevent *good* things from happening (*e.g.*, more local programming, expanded editorial content and additional competition for cable). This is yet another argument for the more focused case-by-case approach provided by review under the antitrust laws of a particular merger or acquisition.

We are mindful of the Commission's traditional concern with fostering a diversity of voices. However, we believe that the wide range of voices in today's market environment is unlikely to be significantly narrowed by elimination of the multiple ownership rules. And conversely, we believe that, if slavish devotion to absolute diversity of viewpoints results in rules that treat traditional broadcasters differently from new competitors, the Commission will undermine the viability of over-the-air broadcasting. It is ironic that Hubbard Broadcasting, a pioneer in the industry, can today reach a national audience with 21 channels (and no regulatory cap) through its USSB DBS subsidiary while it is limited to reaching 25 percent of television households with a single channel by terrestrial means. Moreover, cable MSOs are currently subject to a 30-percent reach limitation, while telephone company video ventures (including through wireless cable) face no *de jure* reach restrictions at all.

Conclusion

The Commission has already decided once that the multiple ownership rules should be eliminated. That decision was based on a careful weighing of a voluminous record. Because of political pressure, the Commission backed off its initial decision and made a modest change in its rules, far less than what was justified by the numbers and the logic of its decision. The passage of time — a decade since those modest changes were adopted — has only served to confirm that the intensity of competition has accelerated and the number of competing voices has grown. In the face of this clear evidence of change and in the absence of any evidence of harm, the Commission seems prepared to adopt what strikes us as an exceedingly modest further relaxation of its ownership rules, which might result in little real relaxation at all given the fact that, as we have noted, the existing limitations are now relatively more restrictive than when they were adopted. In our view, the radical changes in the competitive structure of the electronic media which have transformed and continue to transform the relevant market landscape call for considerably more than modest solutions. This is especially true where, as here, the existence of constraints on free over-the-air terrestrial broadcasting tend to handicap the industry and adversely affect consumers who rely on broadcasting for news, information and entertainment. The goal of regulation should not be to make sure that every competitor is equally constrained, but rather, ideally, to permit competition with as few constraints as possible. The Commission has an opportunity within its grasp to remove or substantially alter its broadcast ownership rules. We urge it to seize this opportunity.

Attachment B

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The Evolving Electronic Media Marketplace and the Devolving Case for Broadcast Ownership Restrictions

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Introduction

Exploding competition in the electronic media marketplace has rendered government broadcast ownership restrictions obsolete, but not irrelevant as their continuation is unfortunately likely to prove hazardous to the consuming public's health. Ownership restrictions have long since stopped being part of the solution;[1] now they are fast becoming part of the problem. Conceived in an era when scarcity of electronic media outlets was the watchword, the government's ownership restrictions were originally designed to encourage diversity of ownership and to safeguard against undue concentration of economic power. In a world where there were only a few outlets, taking steps to ensure adequate competition among the few made some sense. In a world where technology and the market have vastly expanded the number of competing sources of information and entertainment and done more to promote competition and diversity than even the most extreme regulation could ever have contemplated, the old rules now lack a reason. What is worse, they have become incoherent and operate primarily to stifle the effective delivery of diverse programming *via broadcast technology*, including news and public affairs programming.

Not Kansas Anymore

The radical changes which have transformed the video marketplace during the last quarter century have become a commonplace in the print and electronic media. It has become almost impossible to avoid seeing a daily report regarding the introduction of some new communications technology or service that promises to deliver more for less. The basic facts are by now familiar to everyone: The selection and distribution of video programming is no longer anything even remotely resembling an oligopoly with only three primary network players.

Over the last twenty-five years, the video landscape has been radically transformed by a variety of interrelated economic and technological developments. These include remarkable growth in the *number* of conventional broadcast television stations, a huge expansion in the *amount* of programming delivered by cable and other distribution media, and extensive household *penetration*

[1] In 1984, the Federal Communications Commission tentatively concluded that "explosive growth and change" in the mass media market supported a phase-out of national ownership limits. *See Amendment of Multiple Ownership Rules* (General Docket 83-1009) 100 FCC 2d 17, 18 (1984). *recon. granted in part* 100 FCC 2d 74 (1985).

by VCRs and now PC technology. Indeed, conventional video and interactive software sales and rentals now far exceed the revenues of *all* broadcast and basic cable networks.

In 1970, there were only 62 independent television stations (*viz.*, those not affiliated with ABC, CBS or NBC) operating in the United States. By 1993, that number had grown to 438, a remarkable *sevenfold* increase. The simultaneous growth in cable television penetration played a significant role in the growth of independent television. Most independent stations operate in the UHF spectrum band and, as a consequence, are technically disadvantaged in their ability to reach large audiences. Carriage by cable television systems substantially reduces these technical disadvantages and permits UHF stations to be more competitive in acquiring desirable programming and producing larger audiences. According to the FCC, there were on average more than four times as many independent television stations operating in the top-50 markets in 1994 than in 1970.[2]

The economic viability of independent television stations has furthermore enabled the formation of new *broadcast* networks to compete with the established networks. The Fox Broadcasting Company now is able to supply new network programming to nearly 200 affiliates (including secondary affiliates) and currently reaches 98.7 percent of the national audience. In addition to Fox, the United Paramount Network (UPN) recently commenced operations. It is offering two hours of programming two nights per week through 96 affiliates with coverage of about 79 percent of the total audience. The WB Television network (Warner Brothers) also began operations earlier this year. It is offering programming one night a week with plans to expand to additional nights in the future. WB Television reaches about 80 percent of the audience through a combination of approximately 50 local broadcast affiliates and the superstation WGN.

The entry of new broadcast networks has not only brought additional competition for audiences, advertising sales and programming, but for local market affiliates as well. Just a few years ago, CBS attempted to reduce its affiliates' compensation and restructure its relationship with its affiliates. The entry of new networks would make that idea suicidal for a network today. What had been a buyers' market has now clearly become a sellers' market. Potential affiliates are sitting in the proverbial driver's seat, and networks are scrambling to solidify the base of affiliates which,

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[2]In addition to independent stations, the FCC has also authorized the operation of a large number of low-power television stations. Today more than 1300 such stations offer service.

along with owned and operated stations, constitutes a critical component of a network's economic structure. While the number of potential video distribution channels to consumers is now virtually unlimited as a result of advances in technology, the number of conventional broadcast station licenses is limited by the amount of spectrum allocated to the service. With a limited number of outlets and a growing number of commercial networks clamoring for effective local market distribution, station leverage has grown significantly and is likely to continue to grow.

Following Fox's acquisition of broadcast rights to NFL football games, there have been numerous shifts in network affiliation. In December 1994, *Broadcasting & Cable* reported that 68 changes in affiliation had occurred in 37 markets. The benefits produced by this new environment have benefitted all affiliates. The networks have had to improve the compensation they pay in order to retain valuable affiliates and it has been estimated that, as a result, compensation rewards have risen by several hundred million dollars.

During the 1980s cable television became a communications industry giant in the United States, substantially increasing its market penetration, vertically integrating extensively into program production and supply, competing for local and national market advertising sales, and currently poised to enter the market for telephone service. Cable now passes by over 91 million households (about 97 percent of all television households) in the United States, and its market penetration is now about 63 percent of television households. The vast majority of cable subscribers now receive 30 or more channels, and nearly 40 percent receive 54 or more channels. Cable offers a large number and variety of program services. In 1994 there were 79 basic cable networks and 30 national non-basic service networks. There are also a large number of regional cable networks.

Broadcast and cable are not the only means by which video programming is distributed to consumers. More than two million households now receive programming utilizing backyard dishes, acquiring services via subscription as well as availing themselves of numerous free services. SMATV services are utilized by another million subscribers, and wireless cable (MMDS) has attracted over a half million subscribers. Recently direct broadcast satellite systems (DBS) began offering technically very high-quality services and it is estimated that these services will attract more than one million subscribers in 1995.